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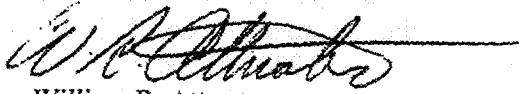


Gray Davis
Governor

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ITEM 10
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TO: Walt Pettit
Executive Officer

FROM: 
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DATE: DEC 01 1999

SUBJECT: THE CLEAN WATER ENFORCEMENT AND POLLUTION PREVENTION
ACT OF 1999 ("SB 709"): SUMMARY AND QUESTIONS AND ANSWERS


SUMMARY

In 1999, the Legislature passed and Governor Davis signed SB 709, which goes into effect on January 1, 2000. This act is entitled the Clean Water Enforcement and Pollution Prevention Act of 1999. The act adds several provisions to California Water Code (CWC) Division 7 that address (1) pollution prevention plans; (2) requirement to prescribe effluent limits; (3) recovery of economic benefit in assessing civil liability; (4) mandatory minimum penalties; and (5) reporting to the legislature. Below is a summary of and a legal analysis in the form of Questions and Answers (Qs&As) on the act.

Pollution Prevention Plans. The new CWC section 13263.3 authorizes the State Water Resources Control Board (State Board), a Regional Water Quality Control Board (Regional Board), or a Publicly Owned Treatment Works (POTW) to require a discharger to complete and implement a pollution prevention plan (PPP). A POTW may require industrial dischargers to prepare and implement a PPP and the State Board or a Regional Board may require a POTW and industrial users to prepare and implement a PPP. This authority is discretionary. The legislation defines what constitutes pollution prevention and specifies what is required to be included in the PPPs. The failure to prepare or implement a PPP may subject the discharger to civil liability and penalties.

Mandatory Minimum Penalties. The new CWC section 13385(h), (i), and (j) provide for mandatory minimum penalties of \$3,000 per violation as described below. There are two types of mandatory penalties, first time serious violations and ongoing violations.

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11. Q. If there is a single operational upset that results in simultaneous violations of more than one pollutant parameter, should the State or Regional Board consider that one violation or multiple violations?

A. CWC section 13385(f) states that a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation. The act (SB709) did not amend section 13385(f) and it applies to determining penalties under CWC section 13385(h) and (i). Therefore, for purposes of CWC section 13385(h) and (i) exceedances of more than one effluent limitation due to a single operational upset would be considered one violation. CWC section 13385(f) is the same provision contained in Clean Water Act section 309(c)(5), 33 U.S.C. section 1319(c)(5) and must be interpreted consistent with federal law. For purposes of that provision EPA defines "single operational upset" as:

"an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. Single operational upset does not include . . . noncompliance to the extent caused by improperly designed or inadequate treatment facilities. See EPA Guidance Interpreting "Single Operational Upset."

This Guidance further defines an "exceptional" incident as a "non-routine malfunctioning of an otherwise generally compliant facility."

A decision by the United State Court of Appeals for the Third Circuit interprets the "single operational upset" provision. See *Public Interest Research Group of New Jersey, Inc. et al. V. Powell Duffryn Terminals Inc.*, (1990, 3d Cir.) 913 F.2d 64. The Court considered a "single operational upset" to mean such things as upsets caused by a sudden violent storm, a bursting tank, or other exceptional event, not operational upsets caused by improperly operated or designed facilities. The Court determined that the "single operational upset" provision applies to the determination of the amount of the liability or penalty, it is not a defense to liability. The "single operational upset" defense differs from the "upset" defense provided by EPA's regulations in 40 C.F.R. section 122.41(n). That "upset" defense may be raised as an affirmative defense to liability and the discharger must meet certain requirements, including reporting the incident within 24 hours.

Merely because more than one effluent limitation is violated does not mean that a "single operational upset" occurred. The discharger has the burden of demonstrating that a "single operational upset" occurred. See *Powell Duffryn*,

913 F.2d at 76. For the purposes of determining the number of violations under CWC section 13385(h) and (i), the Regional Boards should apply EPA's Guidance in determining whether a "single operational upset" has occurred.

Additionally, the single operational upset rule applies to multiple violations of the same effluent limitation. For example, where an "exceptional" incident that meets the definition of a "single operational upset" causes an effluent limitation to be violated for 10 days, one violation would be counted for purposes of assessing a mandatory minimum penalty. Conversely, each violation would be counted where the violations stem from an incident that does not constitute a "single operational upset."

12. Q. If the effluent limitation includes a daily maximum and a monthly average for the same pollutant are violations of each counted as separate violations for purposes of CWC section 13385(h) or (i)?

A. Yes.

13. Q. In determining the number of violations for purposes of CWC section 13385(h) or (i) should the State or Regional Board count one violation for each separate limitation regardless of the number of violations?

A. Unless multiple violations are the result of a single operational upset, violations of separate effluent limitations should each be considered a violation. A violation that fits into more than one category should not be assessed a double penalty. For example, a serious violation could also be a violation of an effluent limitation, but penalties should not be assessed twice for the same violation.

14. Q. How does the State or Regional Board determine a "violation" for purposes of CWC section 13385(i)(2)(A)?

A. CWC section 13385(i)(2)(A) requires the assessment of a mandatory penalty of \$3,000 "for each violation", not counting the first three violations, if the discharger exceeds an effluent limitation four or more times in a six-month period. For purposes of the mandatory penalty provisions, the Regional Board should determine the number of violations based on monitoring data and other evidence that the discharger has exceeded an effluent limitation. For example, if based on one or more monitoring data points in a month, the Regional Board determines that the discharger has violated a monthly average effluent limitation, the Regional Board should consider that one violation. Note, however that if the Regional Board chooses to assess discretionary administrative civil liability for violations of a monthly average it should consider such a violation of a monthly